

Todd M. Friedman (SBN 216752)
Adrian R. Bacon (SBN 280332)
Meghan E. George (SBN 274525)
LAW OFFICES OF TODD M. FRIEDMAN, P.C.
21550 Oxnard St., Suite 780
Woodland Hills, CA 91367
Phone: 877-206-4741
Fax: 866-633-0228
tfriedman@attorneysforconsumers.com
abacon@attorneysforconsumers.com
mgeorge@toddfllaw.com
Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

Case No. **'16CV2333 AJB WVG**
RON RAMOS, individually and on)
behalf of all others similarly situated,) **CLASS ACTION**
Plaintiff,) **COMPLAINT FOR VIOLATIONS**
) **OF:**
vs.)
) 1. NEGLIGENT VIOLATIONS
FUNDKITE, and DOES 1 through 10,) OF THE TELEPHONE
inclusive, and each of them,) CONSUMER PROTECTION
) ACT [47 U.S.C. §227(b)]
) 2. WILLFUL VIOLATIONS
Defendant.) OF THE TELEPHONE
) CONSUMER PROTECTION
) ACT [47 U.S.C. §227(b)]
) 3. NEGLIGENT VIOLATIONS
) OF THE TELEPHONE
) CONSUMER PROTECTION
) ACT [47 U.S.C. §227(c)]
) 4. WILLFUL VIOLATIONS
) OF THE TELEPHONE
) CONSUMER PROTECTION
) ACT [47 U.S.C. §227(c)]

DEMAND FOR JURY TRIAL

1 Plaintiff RON RAMOS (“Plaintiff”), individually and on behalf of all others
2 similarly situated, alleges the following upon information and belief based upon
3 personal knowledge:

4 **NATURE OF THE CASE**

5 1. Plaintiff brings this action individually and on behalf of all others
6 similarly situated seeking damages and any other available legal or equitable
7 remedies resulting from the illegal actions of FUNDKITE (“Defendant”), in
8 negligently, knowingly, and/or willfully contacting Plaintiff on Plaintiff’s cellular
9 telephone in violation of the Telephone Consumer Protection Act, 47. U.S.C. § 227
10 *et seq.* (“TCPA”) and related regulations, specifically the National Do-Not-Call
11 provisions, thereby invading Plaintiff’s privacy.

12 **JURISDICTION & VENUE**

13 2. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) because Plaintiff,
14 a resident of California, seeks relief on behalf of a Class, which will result in at
15 least one class member belonging to a different state than that of Defendant, a
16 company with its principal place of business in the State of New York. Plaintiff
17 also seeks up to \$1,500.00 in damages for each call in violation of the TCPA,
18 which, when aggregated among a proposed class in the thousands, exceeds the
19 \$5,000,000.00 threshold for federal court jurisdiction. Therefore, both diversity
20 jurisdiction and the damages threshold under the Class Action Fairness Act of 2005
21 (“CAFA”) are present, and this Court has jurisdiction.

22 3. Venue is proper in the United States District Court for the Southern
23 District of California pursuant to 18 U.S.C. 1391(b) and 18 U.S.C. § 1441(a)
24 because Defendant does business within the State of California and Plaintiff resides
25 within the County of San Diego.

26 **PARTIES**

27 4. Plaintiff, RON RAMOS (“Plaintiff”), is a natural person residing in
28 San Marcos, California and is a “person” as defined by 47 U.S.C. § 153 (39).

1 5. Defendant, FUNDKITE (“Defendant”) is a merchant cash advance
2 business, and is a “person” as defined by *47 U.S.C. § 153 (39)*.

3 6. The above named Defendant, and its subsidiaries and agents, are
4 collectively referred to as “Defendants.” The true names and capacities of the
5 Defendants sued herein as DOE DEFENDANTS 1 through 10, inclusive, are
6 currently unknown to Plaintiff, who therefore sues such Defendants by fictitious
7 names. Each of the Defendants designated herein as a DOE is legally responsible
8 for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend the
9 Complaint to reflect the true names and capacities of the DOE Defendants when
10 such identities become known.

11 7. Plaintiff is informed and believes that at all relevant times, each and
12 every Defendant was acting as an agent and/or employee of each of the other
13 Defendants and was acting within the course and scope of said agency and/or
14 employment with the full knowledge and consent of each of the other Defendants.
15 Plaintiff is informed and believes that each of the acts and/or omissions complained
16 of herein was made known to, and ratified by, each of the other Defendants.

17 **FACTUAL ALLEGATIONS**

18 8. Beginning in or around May 27, 2016, Defendant contacted Plaintiff
19 on Plaintiff’s cellular telephone number ending in -1554, in an attempt to solicit
20 Plaintiff to purchase Defendant’s services.

21 9. Defendant used an “automatic telephone dialing system”, as defined
22 by *47 U.S.C. § 227(a)(1)* to place its call to Plaintiff seeking to solicit its services.

23 10. Defendant contacted or attempted to contact Plaintiff from the
24 telephone number (347) 462-1187.

25 11. Defendant’s calls constituted calls that were not for emergency
26 purposes as defined by *47 U.S.C. § 227(b)(1)(A)*.

27 12. Defendant’s calls were placed to telephone number assigned to a
28 cellular telephone service for which Plaintiff incurs a charge for incoming calls

1 pursuant to 47 U.S.C. § 227(b)(1).

2 13. During all relevant times, Defendant did not possess Plaintiff's "prior
3 express consent" to receive calls using an automatic telephone dialing system or an
4 artificial or prerecorded voice on his cellular telephone pursuant to 47 U.S.C. §
5 227(b)(1)(A).

6 14. Further, Plaintiff's cellular telephone number ending in -1554 was
7 added to the National Do-Not-Call Registry on or about December 16, 2004.

8 15. Such calls constitute solicitation calls pursuant to 47 C.F.R. §
9 64.1200(c)(2) as they were attempts to promote or sell Defendant's services.

10 16. Despite this, Defendant continued to call Plaintiff in an attempt to
11 solicit its services and in violation of the National Do-Not-Call provisions of the
12 TCPA.

13 17. Upon information and belief, and based on Plaintiff's experiences of
14 being called by Defendant despite being on the National Do-Not-Call Registry
15 since 2005, and at all relevant times, Defendant failed to establish and implement
16 reasonable practices and procedures to effectively prevent telephone solicitations
17 in violation of the regulations prescribed under 47 U.S.C. § 227(c)(5).

18 **CLASS ALLEGATIONS**

19 18. Plaintiff brings this action individually and on behalf of all others
20 similarly situated, as a member the two proposed classes (hereafter, jointly, "The
21 Classes").

22 19. The class concerning the ATDS claim for no prior express consent
23 (hereafter "The ATDS Class") is defined as follows:

24 All persons within the United States who received any
25 solicitation/telemarketing telephone calls from
26 Defendant to said person's cellular telephone made
27 through the use of any automatic telephone dialing
28 system or an artificial or prerecorded voice and such
person had not previously consented to receiving such

1 calls within the four years prior to the filing of this
2 Complaint

3 20. The class concerning the National Do-Not-Call violation (hereafter
4 “The DNC Class”) is defined as follows:

5 All persons within the United States registered on the National
6 Do-Not-Call Registry for at least 30 days, who had not granted
7 Defendant prior express consent nor had a prior established business
8 relationship, who received more than one call made by or on behalf of
9 Defendant that promoted Defendant’s products or services, within any
10 twelve-month period, within four years prior to the filing of the
11 complaint.

12 21. Plaintiff represents, and is a member of, The ATDS Class, consisting
13 of all persons within the United States who received any collection telephone calls
14 from Defendant to said person’s cellular telephone made through the use of any
15 automatic telephone dialing system or an artificial or prerecorded voice and such
16 person had not previously not provided their cellular telephone number to
17 Defendant within the four years prior to the filing of this Complaint.

18 22. Plaintiff represents, and is a member of, The DNC Class, consisting
19 of all persons within the United States registered on the National Do-Not-Call
20 Registry for at least 30 days, who had not granted Defendant prior express consent
21 nor had a prior established business relationship, who received more than one call
22 made by or on behalf of Defendant that promoted Defendant’s products or services,
23 within any twelve-month period, within four years prior to the filing of the
24 complaint.

25 23. Defendant, its employees and agents are excluded from The Classes.
26 Plaintiff does not know the number of members in The Classes, but believes the
27 Classes members number in the thousands, if not more. Thus, this matter should
28 be certified as a Class Action to assist in the expeditious litigation of the matter.

1 24. The Classes are so numerous that the individual joinder of all of its
2 members is impractical. While the exact number and identities of The Classes
3 members are unknown to Plaintiff at this time and can only be ascertained through
4 appropriate discovery, Plaintiff is informed and believes and thereon alleges that
5 The Classes includes thousands of members. Plaintiff alleges that The Classes
6 members may be ascertained by the records maintained by Defendant.

7 25. Plaintiff and members of The ATDS Class were harmed by the acts of
8 Defendant in at least the following ways: Defendant illegally contacted Plaintiff
9 and ATDS Class members via their cellular telephones thereby causing Plaintiff
10 and ATDS Class members to incur certain charges or reduced telephone time for
11 which Plaintiff and ATDS Class members had previously paid by having to retrieve
12 or administer messages left by Defendant during those illegal calls, and invading
13 the privacy of said Plaintiff and ATDS Class members.

14 26. Common questions of fact and law exist as to all members of The
15 ATDS Class which predominate over any questions affecting only individual
16 members of The ATDS Class. These common legal and factual questions, which
17 do not vary between ATDS Class members, and which may be determined without
18 reference to the individual circumstances of any ATDS Class members, include,
19 but are not limited to, the following:

- 20 a. Whether, within the four years prior to the filing of this
21 Complaint, Defendant made any telemarketing/solicitation call
22 (other than a call made for emergency purposes or made with
23 the prior express consent of the called party) to a ATDS Class
24 member using any automatic telephone dialing system or any
25 artificial or prerecorded voice to any telephone number
26 assigned to a cellular telephone service;
- 27 b. Whether Plaintiff and the ATDS Class members were damaged
28 thereby, and the extent of damages for such violation; and

1 c. Whether Defendant should be enjoined from engaging in such
2 conduct in the future.

3 27. As a person that received numerous telemarketing/solicitation calls
4 from Defendant using an automatic telephone dialing system or an artificial or
5 prerecorded voice, without Plaintiff's prior express consent, Plaintiff is asserting
6 claims that are typical of The ATDS Class.

7 28. Plaintiff and members of The DNC Class were harmed by the acts of
8 Defendant in at least the following ways: Defendant illegally contacted Plaintiff
9 and DNC Class members via their telephones for solicitation purposes, thereby
10 invading the privacy of said Plaintiff and the DNC Class members whose telephone
11 numbers were on the National Do-Not-Call Registry. Plaintiff and the DNC Class
12 members were damaged thereby.

13 29. Common questions of fact and law exist as to all members of The
14 DNC Class which predominate over any questions affecting only individual
15 members of The DNC Class. These common legal and factual questions, which do
16 not vary between DNC Class members, and which may be determined without
17 reference to the individual circumstances of any DNC Class members, include, but
18 are not limited to, the following:

- 19 a. Whether, within the four years prior to the filing of this
20 Complaint, Defendant or its agents placed more than one
21 solicitation call to the members of the DNC Class whose
22 telephone numbers were on the National Do-Not-Call Registry
23 and who had not granted prior express consent to Defendant and
24 did not have an established business relationship with
25 Defendant;
- 26 b. Whether Defendant obtained prior express written consent to
27 place solicitation calls to Plaintiff or the DNC Class members'
28 telephones;

1 c. Whether Plaintiff and the DNC Class member were damaged
2 thereby, and the extent of damages for such violation; and

3 d. Whether Defendant and its agents should be enjoined from
4 engaging in such conduct in the future.

5 30. As a person that received numerous solicitation calls from Defendant
6 within a 12-month period, who had not granted Defendant prior express consent
7 and did not have an established business relationship with Defendant, Plaintiff is
8 asserting claims that are typical of the DNC Class.

9 31. Plaintiff will fairly and adequately protect the interests of the members
10 of The Classes. Plaintiff has retained attorneys experienced in the prosecution of
11 class actions.

12 32. A class action is superior to other available methods of fair and
13 efficient adjudication of this controversy, since individual litigation of the claims
14 of all Classes members is impracticable. Even if every Classes member could
15 afford individual litigation, the court system could not. It would be unduly
16 burdensome to the courts in which individual litigation of numerous issues would
17 proceed. Individualized litigation would also present the potential for varying,
18 inconsistent, or contradictory judgments and would magnify the delay and expense
19 to all parties and to the court system resulting from multiple trials of the same
20 complex factual issues. By contrast, the conduct of this action as a class action
21 presents fewer management difficulties, conserves the resources of the parties and
22 of the court system, and protects the rights of each Classes member.

23 33. The prosecution of separate actions by individual Classes members
24 would create a risk of adjudications with respect to them that would, as a practical
25 matter, be dispositive of the interests of the other Classes members not parties to
26 such adjudications or that would substantially impair or impede the ability of such
27 non-party Class members to protect their interests.

28 34. Defendant has acted or refused to act in respects generally applicable

1 to The Classes, thereby making appropriate final and injunctive relief with regard
2 to the members of the Classes as a whole.

3 **FIRST CAUSE OF ACTION**

4 **Negligent Violations of the Telephone Consumer Protection Act**

5 **47 U.S.C. §227(b)**

6 **On Behalf of the ATDS Class**

7 35. Plaintiff repeats and incorporates by reference into this cause of action
8 the allegations set forth above at Paragraphs 1-34.

9 36. The foregoing acts and omissions of Defendant constitute numerous
10 and multiple negligent violations of the TCPA, including but not limited to each
11 and every one of the above cited provisions of *47 U.S.C. § 227(b)*, and in particular
12 *47 U.S.C. § 227 (b)(1)(A)*.

13 37. As a result of Defendant's negligent violations of *47 U.S.C. § 227(b)*,
14 Plaintiff and the ATDS Class Members are entitled an award of \$500.00 in statutory
15 damages, for each and every violation, pursuant to *47 U.S.C. § 227(b)(3)(B)*.

16 38. Plaintiff and the ATDS Class members are also entitled to and seek
17 injunctive relief prohibiting such conduct in the future. *47 U.S.C. § 227(b)(3)(A)*.

18 **SECOND CAUSE OF ACTION**

19 **Knowing and/or Willful Violations of the Telephone Consumer Protection**

20 **Act**

21 **47 U.S.C. §227(b)**

22 **On Behalf of the ATDS Class**

23 39. Plaintiff repeats and incorporates by reference into this cause of action
24 the allegations set forth above at Paragraphs 1-38.

25 40. The foregoing acts and omissions of Defendant constitute numerous
26 and multiple knowing and/or willful violations of the TCPA, including but not
27 limited to each and every one of the above cited provisions of *47 U.S.C. § 227(b)*,
28 and in particular *47 U.S.C. § 227 (b)(1)(A)*.

41. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227(b), Plaintiff and the ATDS Class members are entitled an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

42. Plaintiff and the Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

THIRD CAUSE OF ACTION

Negligent Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(c)

On Behalf of the DNC Class

43. Plaintiff repeats and incorporates by reference into this cause of action the allegations set forth above at Paragraphs 1-42.

44. The foregoing acts and omissions of Defendant constitute numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above cited provisions of 47 U.S.C. § 227(c), and in particular 47 U.S.C. § 227 (c)(5).

45. As a result of Defendant's negligent violations of 47 U.S.C. § 227(c), Plaintiff and the DNC Class members are entitled an award of \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(c)(5)(B).

46. Plaintiff and the DNC Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future. 47 U.S.C. § 227(c)(5)(A).

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FOURTH CAUSE OF ACTION

Knowing and/or Willful Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(c)

On Behalf of the DNC Class

47. Plaintiff repeats and incorporates by reference into this cause of action the allegations set forth above at Paragraphs 1-46.

48. The foregoing acts and omissions of Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above cited provisions of 47 U.S.C. § 227(c), in particular 47 U.S.C. § 227 (c)(5).

49. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227(c), Plaintiff and the DNC Class members are entitled an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(c)(5).

50. Plaintiff and the DNC Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests judgment against Defendant for the following:

FIRST CAUSE OF ACTION

Negligent Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(b)

- As a result of Defendant's negligent violations of 47 U.S.C. §227(b)(1), Plaintiff and the ATDS Class members are entitled to and request \$500 in statutory damages, for each and every violation, pursuant to 47 U.S.C. 227(b)(3)(B).
- Any and all other relief that the Court deems just and proper.

SECOND CAUSE OF ACTION

Knowing and/or Willful Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(b)

- As a result of Defendant's willful and/or knowing violations of 47 U.S.C. § 227(b)(1), Plaintiff and the ATDS Class members are entitled to and request treble damages, as provided by statute, up to \$1,500, for each and every violation, pursuant to 47 U.S.C. §227(b)(3)(B) and 47 U.S.C. §227(b)(3)(C).
- Any and all other relief that the Court deems just and proper.

THIRD CAUSE OF ACTION

Negligent Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(c)

- As a result of Defendant's negligent violations of 47 U.S.C. §227(c)(5), Plaintiff and the DNC Class members are entitled to and request \$500 in statutory damages, for each and every violation, pursuant to 47 U.S.C. 227(c)(5).
- Any and all other relief that the Court deems just and proper.

FOURTH CAUSE OF ACTION

Knowing and/or Willful Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(c)

- As a result of Defendant's willful and/or knowing violations of 47 U.S.C. §227(c)(5), Plaintiff and the DNC Class members are entitled to and request treble damages, as provided by statute, up to \$1,500, for each and every violation, pursuant to 47 U.S.C. §227(c)(5).
- Any and all other relief that the Court deems just and proper.

51. Pursuant to the Seventh Amendment to the Constitution of the United

1 States of America, Plaintiff is entitled to, and demands, a trial by jury.
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4 Respectfully Submitted this 15th Day of September, 2016.

5 LAW OFFICES OF TODD M. FRIEDMAN, P.C.

6 By: /s/ Todd M. Friedman

7 Todd M. Friedman

8 Law Offices of Todd M. Friedman

9 Attorney for Plaintiff
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